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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

ROBERT QUIRKE SHORT, Plaintiff and Appellant, v. NEW PENN FINANCIAL, LLC, et al., Defendants and Respondents.	C081419 (Super. Ct. No. TCU156159)

THE APPEAL

Plaintiff Robert Quirke Short filed this action against the defendants banking and financial services entities after they recorded a notice of default against his property. Defendants rescinded the notice of default, but after the trial court sustained their demurrers, plaintiff filed an amended complaint alleging defendants injured him by initiating nonjudicial foreclosure when they had no interest, personally or as agents, in the deed of trust. Plaintiff alleged damages in tort. The trial court sustained defendants' demurrers with prejudice and entered a judgment of dismissal. Because plaintiff did not,

and cannot, plead sufficient facts to recover on his theory that defendants initiated foreclosure proceedings without the authority to do so, we affirm the judgment.

FACTS AND LEGAL PROCEEDINGS

In 2006, plaintiff obtained a loan which was secured by a deed of trust on real property he owns in Truckee.

In 2010, beneficial interest in the deed of trust was assigned to The Bank of New York Mellon (BNYM), fka the Bank of New York, as Trustee for the Certificateholders of CWABS Asset-Backed Notes Trust 2007-SD1.

Plaintiff defaulted on the loan, and the loan servicer, defendant New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing (Shellpoint), recorded a notice of default on February 13, 2015. The notice of default named the beneficiary with a slightly different name than that stated on the assignment of the deed of trust. The notice named the beneficiary as defendant The Bank of New York Mellon, fka the Bank of New York, as Trustee for the Benefit of the Certificateholders of the CWABS, Inc. Asset-Backed Certificates, Series 2007-SD-1. In brief, the assignment of the deed of trust referred to the "Asset-Backed Notes Trust," while the notice of default referred to the "Asset-Backed Certificates." For ease of reference only, we refer to the entity named in the assignment as the Notes Trust, and the entity named in the notice of default as defendant Certificates Trust.

Plaintiff filed this action on August 4, 2015, against Shellpoint, the Certificates Trust, the trustee, and other parties. Defendants filed demurrers, and the trial court sustained the demurrers with leave to amend.

Meanwhile, on August 27, 2015, the trustee on plaintiff's deed of trust recorded a notice of rescission rescinding the notice of default. The property has not been sold.

Although the foreclosure process had been terminated, plaintiff filed an amended complaint on November 23, 2015. He named as defendants Shellpoint; the Bank of New

York Mellon as trustee of the Certificates Trust; CWABS, Inc.; Resurgent Mortgage Servicing, L.P.; Old Republic Default Management Services; and the group of investors who purchased interests in the Certificates Trust. He expressly alleged he filed the suit to stop the sale of his home and determine his rights to the property. He pleaded causes of action for negligence, concealment and misrepresentation, unfair business practices under Business and Professions Code section 17200, civil conspiracy, and quiet title.

Plaintiff alleged his obligation under the note had been performed but defendants continued to charge him and foreclose on the deed of trust. His obligation had been fulfilled either by a settlement in mortgage securitization litigation involving the Certificates Trust or through the payment of a mortgage insurance policy, yet defendants continued to impose charges on him, misrepresented the amount he owed, and wrongfully initiated foreclosure proceedings. Furthermore, the defendants conspired to maximize their profits by transferring the servicing of the loan from one related company to another to overcome statutory limits on servicing fees.

Plaintiff further asserted the Certificates Trust and its agents had no authority to initiate foreclosure. He alleged the deed of trust was assigned to the Certificates Trust, but no such assignment was recorded. This separated the note from the deed of trust and broke the chain of title, resulting in defendants not being holders in due course with authority to enforce the deed of trust. Moreover, the recorded assignment stated the deed of trust was assigned to the Notes Trust, not the Certificates Trust which recorded the notice of default. Plaintiff alleges defendants conspired to record the assignment of the deed of trust to the Notes Trust in order to cover up the break in the chain of title and ultimately allow them to foreclose on his property unlawfully.

Plaintiff also contended the defendants failed to comply with statutory requirements for noticing and conducting a nonjudicial foreclosure.

The trial court sustained defendants' demurrers to the amended complaint with prejudice. The court dismissed the negligence claim because financial institutions do not

owe a duty of care to a borrower unless they exceed the scope of their traditional role as a lender of money. Plaintiff did not allege the defendants exceeded their roles.

The court dismissed the concealment and misrepresentation cause of action because plaintiff had not pleaded fraud with specificity. It dismissed the unfair business practices claim because it was predicated on the dismissed negligence and fraud claims. The court dismissed the civil conspiracy claim because plaintiff did not allege any facts in support of a conspiracy. It dismissed the claim to quiet title because plaintiff did not first tender performance. The court entered a judgment of dismissal in favor of defendants.

DISCUSSION

Plaintiff contends the trial court erred. He asserts the discrepancy between naming the Notes Trust in the assignment of the deed of trust as the beneficiary and the Certificates Trust in the notice of default as the beneficiary establishes that the defendants, who are the parties named in the notice of default, have no interest in his property and unlawfully initiated foreclosure proceedings. In particular, they violated Civil Code section 2924, subdivision (a)(6), which prohibits anyone other than the trustee, the beneficiary or its agents from filing a notice of default. Plaintiff claims this fact justified overruling the demurrer against each of his causes of action.

Plaintiff also claims he pleaded sufficient facts to recover for a civil conspiracy because defendants conspired to acquire his property wrongfully, and because Shellpoint conspired to increase the servicing charges imposed on him by switching servicers within its corporate umbrella after accumulating the maximum amount of service charges the entity could charge, in violation of Civil Code section 2924c, subdivision (d).

Plaintiff argues the trustee's rescission of the notice of default does not affect this action. He claims the rescission did not erase the notice of default from his record of title. The faulty notice informs the world that Shellpoint has the authority to act as an

agent for the beneficiary when it does not. Rescission also did not erase "the emotional and monetary damage" plaintiff suffered.

Defendants contend the trial court correctly sustained their demurrers with prejudice. They claim plaintiff has no standing to bring this action because California law prohibits a borrower from attacking the lender's authority to foreclose until after the trustee sale has occurred. They also argue the trustee's rescission of the notice of default moots much of plaintiff's attack against them. BNYM further argues a breach of the nonjudicial foreclosure statutes should not be a basis for a preemptive action for damages.

Defendants also contend that in any event, plaintiff did not allege sufficient facts, justifiable reliance, or damages to support any of his causes of action.

We conclude the trial court correctly sustained the demurrers with prejudice. In his amended complaint, plaintiff essentially alleged the defendants initiated foreclosure without the authority to do so, and he suffered damages from that attempt. We agree with the trial court that plaintiff did not, and cannot, plead sufficient facts to recover on that theory.

I

Standing

Defendants first ask us to resolve this matter based on plaintiff's lack of standing. The issue is not as clear as defendants argue. As defendants state in their briefs, districts of the Court of Appeal have held a borrower cannot preemptively challenge a lender's authority to pursue nonjudicial foreclosure. The leading cases are *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511 (*Jenkins*), disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13 (*Yvanova*); and *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157 (*Gomes*); see also *Saterbak v. JPMorgan Chase Bank, N.A.* (2016)

245 Cal.App.4th 808, 814 (*Saterbak*); *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 743 (*Kan*).)

In *Jenkins*, the court of appeal, relying on *Gomes*, stated California law does not permit "preemptive judicial actions to challenge the right, power, and authority of a foreclosing 'beneficiary' or beneficiary's 'agent' to initiate and pursue foreclosure." (*Jenkins, supra*, 216 Cal.App.4th at p. 511.) "[A]llowing a trustor-debtor to pursue such an action, absent a '*specific factual basis* for alleging that the foreclosure was not initiated by the correct party' would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature, and 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy [Citation.]' ([*Gomes, supra*, 192 Cal.App.4th] at pp. 1154-1156.)" (*Jenkins, supra*, 216 Cal.App.4th at p. 512, original italics.) *Saterbak* and *Kan* follow *Jenkins* and *Gomes*. (*Saterbak, supra*, 245 Cal.App.4th at p. 815; *Kan, supra*, 230 Cal.App.4th at p. 744.)

These holdings may be overbroad. After *Gomes* was announced, the Legislature adopted the Homeowner Bill of Rights (Civ. Code, §§ 2920.5, 2923.4-.7, 2924, 2924.9-.12, 2924.15, 2924.17-.20; effective Jan. 1, 2013). (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) This legislation authorized borrowers to seek injunctive relief preemptively under certain circumstances. (Civ. Code, § 2924.12.) The violation of section 2924, subdivision (a)(6), which plaintiff alleges here, is not one of those circumstances, but the remedies the Homeowner Bill of Rights provides are not exclusive. (Civ. Code, former § 2924.12, subd. (h); § 2924.12, subd. (g); *California Golf, LLC v. Cooper* (2008) 163 Cal.App.4th 1053, 1070.)

Additionally, language in *Gomes* that *Jenkins* quotes indicates a borrower may be able to file a preemptive wrongful foreclosure action if he or she has a "specific factual basis for alleging that the foreclosure was not initiated by the correct party." (*Gomes, supra*, 192 Cal.App.4th at p. 1156, italics omitted.)

Yvanova may also have opened the door to preemptive relief. In *Yvanova*, the California Supreme Court overruled *Jenkins* to the extent it prohibited a borrower in a wrongful foreclosure action from challenging the assignment under which a beneficiary claimed authority. (*Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.) The court held a borrower could challenge the beneficiary's authority in a wrongful foreclosure action if the assignment by which the beneficiary purportedly gained its interest in the deed of trust was void. (*Id*. at pp. 942-943.) The court expressly did not address the holdings in *Jenkins* and *Gomes* that a borrower may not preemptively challenge a beneficiary's authority in order to forestall a nonjudicial foreclosure. (*Id*. at p. 934.)

Although *Yvanova* authorized the action as a wrongful foreclosure action and did not address preemptive challenges, its reasoning arguably could apply to preemptive actions. The court reasoned it was not correct, as the defendants argued in that case, "that the borrower has no cognizable interest in the identity of the party enforcing his or her debt. Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt." (*Yvanova, supra*, 62 Cal.4th at pp. 937-938.) To argue a borrower has no standing merely because he or she owes the debt to an assignee "implies that *anyone*, even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to *someone*, though not to the foreclosing entity. This would be an 'odd result' indeed. [Citation.]" (*Id*. at p. 938, original italics.) Taken together, these developments in statutory and judicial law suggest the rule announced by *Jenkins* and *Gomes* may not be on firm ground.

Moreover, plaintiff's amended complaint was not truly preemptive. By the time he filed it, defendants had rescinded the notice of default. There was no pending trustee sale to challenge preemptively. At that point, all plaintiff could theoretically challenge was defendant's initiation of foreclosure. He had a specific factual basis for alleging the

foreclosure was not initiated by an authorized party, as the beneficiary named in the notice of default did not match the beneficiary named in the assignment of the deed of trust. Even though it was not necessary for the trustee to name the beneficiary in the notice of default (Civ. Code, § 2924, subd. (a)(1)(A)-(D)), the discrepancy nonetheless provided plaintiff with a factual basis for claiming the foreclosure was initiated by an unauthorized entity.

Thus, rather than resolve this matter on the basis of standing, an issue we do not decide, we turn to the amended complaint's allegations and causes of action, as argued before us by plaintiff, to determine whether he can recover damages for the defendants' initiation and cessation of a nonjudicial foreclosure. Like the trial court, we conclude he cannot.

II

Sufficiency of Plaintiff's Causes of Action

"On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. [An appellate court] thus reviews the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action. If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. [Citation.]

"When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal. [Citations.]

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

We address each cause of action.

A. *Negligence*

Plaintiff contends defendants violated a duty of care by recording the notice of default when they were in fact strangers to the title and had no legal right to invoke the power of sale. He also contends Shellpoint violated a duty of care by charging unreasonable service rates, failing to give notice required under the nonjudicial foreclosure statutes, and charging duplicative and unnecessary service charges. He argues the defendants owed him a duty of care because, by taking the unlawful actions alleged, they exceeded their traditional banking roles as mere lenders of money, roles that usually do not give rise to a duty of care owed to borrowers. (See *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095-1096 ["[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money"].) He asserts defendants' actions harmed him.

Plaintiff did not sufficiently allege damages. The elements of a negligence cause of action are duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) "Not just any damage will cause a strict liability or negligence cause of action to accrue. One thing is clear: economic loss alone, without physical injury, does not amount to the type of damage that will cause a negligence . . . cause of action to accrue. 'In a strict liability or negligence case, the *compensable injury* must be *physical harm to persons or property*, not mere economic loss.' (*Zamora v. Shell Oil Co.*

[(1997) 55 Cal.App.4th 204,] 210.)" (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318, original italics.)

Plaintiff alleges his damages from defendants' negligence consists of the costs incurred to bring this action, lost sleep, anxiety, impairment of his title, loss of money he paid on the note, and accrued late charges and interest.

None of these costs can be recovered as damages in a negligence claim. Plaintiff alleges no physical injury to his person or property, so he cannot recover for any economic loss he has incurred. Also, attorney fees and costs of suit are not recoverable damages in tort. (*Bean v. Pacific Coast Elevator Corp.* (2015) 234 Cal.App.4th 1423, 1431, fn. 21.)

Most significantly, plaintiff has not sufficiently alleged emotional distress. "In *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 (*Molien*), the Supreme Court made it clear that to recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was 'serious.' [Citations.] ¶ Moreover, the court explained, ' "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." [Citation.]' (*Molien, supra*, 27 Cal.3d 916 at p. 928, quoting *Rodrigues v. State* (1970) 52 Haw. 156, 283.)" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377-1378 (*Wong*).)

The articulation of " 'serious emotional distress' " is functionally equivalent to the articulation of " 'severe emotional distress' " in causes of action for intentional infliction of emotional distress. (*Wong, supra*, 189 Cal.App.4th at p. 1378) "Although 'emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry' [citation], to make out a claim, the plaintiff must prove that emotional distress was severe and not trivial or transient. [Citation.]

"The California Supreme Court has set a 'high bar' for what can constitute severe distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [].) 'Severe emotional distress means " 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " [Citations.]' [Citations.]" (*Wong*, *supra*, 189 Cal.App.4th at p. 1376.)

Plaintiff cannot meet this standard. The notice of default was recorded for a period of roughly six months and was rescinded before plaintiff filed his amended complaint. During that time, plaintiff suffered anxiety and loss of sleep that most people would experience understanding their home may be repossessed. In this context, anxiety and loss of sleep do not rise to the level of serious or severe emotional distress necessary for recovering damages in a negligence claim. Indeed, because the notice of default was rescinded, it is unreasonable to believe plaintiff suffered the type of distress recoverable in negligence. The trial court did not err in sustaining the demurrer to the negligence claim with prejudice, nor is there a reasonable possibility plaintiff can amend to cure the defect.

B. *Misrepresentation and concealment*

In his opening brief, plaintiff states his cause of action for misrepresentation and concealment is essentially one for fraud. He claims he alleged the defendants applied settlement payments from securitized mortgage trust litigation or proceeds from mortgage insurance to his loan but did not disclose the fact and continued to charge him. He also alleges defendants misrepresented in the notice of default that the Certificates Trust was the beneficiary, when in fact it was the Notes Trust. Plaintiff contends these misrepresentations damaged his title, cost him his investment in his property, negatively affected his credit, and caused him to incur attorney fees and medical bills.

Plaintiff did not and cannot sufficiently allege detrimental reliance on the purported misrepresentations. The elements of fraud are a misrepresentation with

knowledge of its falsity and with the intent to induce another's reliance on it, justifiable reliance, and resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) " 'Actual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation, " 'he would not, in all reasonable probability, have entered into the contract or other transaction.' " [Citations.] "It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentations be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." ' [Citation.]" (*Ibid*.)

Plaintiff did not allege in the amended complaint how he relied upon the omissions and misrepresentations to his detriment. His theory that defendants received funds through loan securitizations, settlement of claims arising from securitizations, or mortgage insurance that should have been applied to his loan fails as a matter of law. As the United States Fifth Circuit Court of Appeals stated, "[Plaintiffs] cite no cases holding that a lender must decrease the borrower's loan balance by the amount received from third-party transactions, likely because no court has accepted this novel theory. In fact, many courts have rejected similar claims based on a lender's receipt of funds from credit default swaps and other comparable sources. (*See Rosas v. Carnegie Mortgage, LLC* [(C.D. Cal. May 21, 2012)] No. CV 11–7692 CAS CWX, . . . 2012 WL 1865480, at p. 8 . . . ('[P]laintiffs' theory that lenders that received funds through loan securitizations or credit default swaps must waive their borrowers' obligations fails as a matter of law.'); *Taylor v. CitiMortgage, Inc.* [(D. Utah Nov. 10, 2010)] 2:10–CV–505 TS, . . . 2010 WL 4683881, at p. 3 . . . ('[T]he separate contract that is the result of securitization does not free Plaintiffs from the terms agreed upon in the Deeds of Trust.'); *Flores v. Deutsche Bank Nat'l Trust, Co.* [(D. Md. July 7, 2010)] CIV. A. DKC 10–0217, . . . 2010 WL 2719849, at p. 5 . . . (dismissing a claim alleging that defendants lacked standing to

enforce a note because they had already been compensated by credit enhancement policies)." (*Shaver v. Barrett Daffin Frappier Turner & Engel, LLP* (5th Cir. 2014) 593 Fed.Appx. 265, 272.) Plaintiff could not rely on this theory to claim he was wrongly induced to stop paying on his loan.

Plaintiff also pleaded no detrimental reliance on the alleged misrepresentation of the true beneficiary in the assignment of the deed of trust. The amended complaint contains no allegations that plaintiff changed his position or relations in any way because of the assignment in the deed of trust. The trial court correctly sustained the demurrer with prejudice against plaintiff's fraud claim, and there is no reasonable possibility plaintiff can amend.

C. *Unfair business practices*

Plaintiff alleges defendants committed unfair business practices in violation of Business and Professions Code section 17200 et seq., commonly known as the Unfair Competition Law (UCL). He argues that defendants' recording the notice of default naming the Certificates Trust as the beneficiary was sufficient to plead a claim for unfair business practices. Plaintiff cannot state a claim because he has no available relief.

The UCL prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. Its remedies, however, are limited. "A UCL action is equitable in nature; damages cannot be recovered. [Citation.] Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions. [Citation.] We have stated that under the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.)

Plaintiff cannot obtain injunctive relief because the allegedly unlawful act, recording the notice of default, was rescinded. He cannot obtain restitution, as he does not allege defendants acquired any money or property from him by means of recording

the notice of default. (Bus. & Prof. Code, § 17203; *Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at pp. 1146-1147.) With nothing to enjoin or restore, plaintiff cannot recover under the UCL. The trial court correctly sustained the demurrer to this cause of action with prejudice, and plaintiff cannot amend.

D. *Civil conspiracy*

Plaintiff contends he sufficiently pleaded a civil conspiracy among defendants. He asserted defendants, as a conspiracy, changed the title to his property and recorded it in the name of the Certificates Trust instead of the Notes Trust to cover up a break in the chain of title and ultimately foreclose on the loan. Plaintiff also alleged Shellpoint and its subsidiaries conspired to increase the servicing charges on his loan by switching servicers within Shellpoint's corporate umbrella after reaching the maximum amount of service charges the entity could charge to maximize profit, in violation of Civil Code section 2924c, subdivision (d). These allegations are insufficient.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784.) By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. (*Ibid*.) In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.

"Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort. ' "A civil conspiracy, however atrocious, does not . . . give rise to a cause of action unless a civil wrong has been committed resulting in damage." ' (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [hereafter *Doctors' Co*.], citing *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631.) 'A bare agreement among two or more persons to harm a third person cannot

injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.' (Note, Civil Conspiracy and Interference With Contractual Relations (1975) 8 Loyola L.A.L.Rev. 302, 308, fn. 28 [].)

"We have summarized the elements and significance of a civil conspiracy: ' "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . " ' " (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, quoting *Doctors' Co., supra*, 49 Cal.3d at p. 44.)

Once again, plaintiff cannot plead he was damaged. He suffered no recoverable damages from the defendants' recording the notice of default in the wrong name. He also cannot recover for any type of conspiracy by Shellpoint and its subsidiaries in charging servicing charges in violation of Civil Code section 2924c, subdivision (d). That statute limits the amount that may be charged in trustee fees and attorney fees when a trustor or mortgagor such as plaintiff reinstates the loan after a notice of default has been filed. (Civ. Code, § 2924c, subds. (a), (d).) Plaintiff never alleged he attempted to reinstate his loan, and upon the defendants rescinding the notice of default, the statute no longer applied. The trial court correctly sustained the demurrer to plaintiff's civil conspiracy cause of action with prejudice, and there is no reasonable possibility plaintiff can amend.

E. *Quiet title*

Plaintiff claims the recording of the notice of default naming the Certificates Trust as beneficiary instead of the Notes Trust was evidence of adverse claims against his title and entitled him to an action to quiet title. The trial court correctly disagreed. Any such action was mooted when defendants rescinded the notice of default. As a result, there is no adverse claim on his title.

More significantly, defendant never pleaded he tendered payment. "[A] mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." (*Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 820.) Plaintiff thus lacks standing to bring an action to quiet title. The trial court correctly sustained the demurrer against this cause of action with prejudice, and no reasonable probability exists for plaintiff to amend.

DISPOSITION

The judgment of dismissal is affirmed. Costs on appeal are awarded to defendants. (Cal. Rules of Court, rule 8.278(a).)

HULL, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.